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Criminal Procedure - Exclusionary Rule - Good Faith Exception - The Exclusionary Rule Will Not Operate in Circumstances Where the Officer's Violation Was Committed in the Reasonable, Good Faith Belief That His Actions Were Legal

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CRIMINAL PROCEDURE—EXCLUSIONARY RULE—"GOOD FAITH" EXCEPTION—THE EXCLUSIONARY RULE WILL NOT OPERATE IN CIRCUMSTANCES WHERE THE OFFICER'S VIOLATION WAS COMMITTED IN THE REASONABLE, GOOD FAITH BELIEF THAT HIS ACTIONS WERE LEGAL.

United States v. Williams (5th Cir. 1980)

Jo Ann Williams was convicted of possession of heroin and sentenced to three years imprisonment.[1] Subsequently, the District Court for the Northern District of Ohio ordered her release pending appeal,[2] on the condition that she remain in Ohio.[3] The arresting officer, Special

1. United States v. Williams, 622 F.2d 830, 833 (5th Cir. 1980). Williams was arrested in Toledo, Ohio and charged with violation of the Controlled Substances Act. *Id.* *See* 21 U.S.C. §§ 801-966 (1976). The pertinent section of the Controlled Substances Act provides: "(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ." 21 U.S.C. § 841(a)(1) (1976). Heroin is a controlled substance. 21 U.S.C. § 812(c) (1976).

The defendant pleaded guilty after the district court denied her motion to suppress evidence of the heroin. 622 F.2d at 833. She subsequently appealed that denial after she was sentenced. *Id.*

2. 622 F.2d at 833. Williams' release was ordered pursuant to 18 U.S.C. § 3148. *Id.* at 833 n.3. The pertinent portion of § 3148 provides:

> A person . . . who has been convicted of an offense and . . . has filed an appeal . . . shall be treated in accordance with the provisions of section 3146 unless the court or judge has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

18 U.S.C. § 3148 (1976). For the pertinent text of § 3146, *see* note 3 *infra*.

3. 622 F.2d at 833. The federal statutory provision providing for release in noncapital cases prior to trial permits the imposition of travel restrictions as a condition of release pending appeal. *See* 18 U.S.C. § 3146(a)(2) (1976). The statute provides that:

> Any person charged with an offense, other than an offense punishable by death, shall at his appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer, unless the officer determines, in the exercise of his discretion, that such a release will not reasonably assure the appearance of the person as required. When such determination is made, the judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:
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> (2) . . . place restrictions on the travel, association, or place of abode of the person during the period of release. . . .

Id. This section is specifically applied by 18 U.S.C. § 3148 (1976) to defendants awaiting appellate review of their cases. For the pertinent text of § 3148, *see* note 2 *supra*.

Agent Paul J. Markonni of the Drug Enforcement Administration (DEA), recognized Williams while he was on assignment at the Atlanta International Airport.[4] Aware of the court imposed travel restriction,[5] Markonni approached her for questioning.[6] When Williams failed to satisfactorily explain her absence from Ohio, Markonni arrested her.[7]

A search of Williams's person made incident to the arrest [8] uncovered a packet of heroin in her pocket in violation of the Controlled Substances Act.[9] Agent Markonni used this evidence to obtain a warrant for Williams's luggage [10] which, it was discovered, contained a large quantity of heroin.[11]

Williams moved to suppress all evidence of the heroin.[12] The District Court for the Northern District of Georgia suppressed the evi-

4. 622 F.2d at 834. Markonni saw Williams departing a non-stop flight from Los Angeles. *Id.*

5. *Id.* Markonni had been informed of the travel restrictions by an Assistant United States Attorney in Ohio. *Id.* at 834 n.5.

6. *Id.* at 834. Markonni identified himself and asked Williams for her identification. *Id.* The Supreme Court approved a stop and inquiry of this type by DEA agents in airport terminals when the individuals freedom of movement is not constrained by physical force or show of authority. United States v. Mendenhall, 446 U.S. 544 (1980). In response to the agent's questioning, Williams produced the same Michigan driver's license she had shown Markonni when he arrested her the year before in Ohio. 622 F.2d at 34.

7. 622 F.2d at 834. Williams was, therefore, initially arrested for violating the travel restriction of her release order. *Id.* Williams was carrying an airline ticket that showed she was about to depart for Lexington, Kentucky which she had produced in addition to her driver's license. *Id.* Williams admitted that she had not obtained permission to leave Ohio, and claimed she was about to leave for Kentucky because it was now her home. *Id.*

8. *Id.* Williams was conducted to the airport police office and then searched. *Id.*

9. *Id.* *See* Controlled Substances Act, 21 U.S.C. §§ 801-966 (1976). For the pertinent sections of the Act, *see* note 1 *supra.*

10. 622 F.2d at 834. Before obtaining the warrant, Agent Markonni took Williams's baggage claim check and retrieved her unopened luggage. *Id.* For the text of the affidavit Markonni presented to the magistrate to secure the warrant, *see id.* at 834 n.8. The warrant was necessary because Williams refused to consent to a search of her bags. *Id.* at 834.

11. *Id.* at 835.

12. *Id.* The statutory provision giving DEA agents the power to make warrantless arrests, provides in pertinent part:

> Any officer or employee of the Drug Enforcement Administration designated by the Attorney General may—
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> . . .
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> . . . make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony.

21 U.S.C. § 878(3) (1976). Williams argued that her arrest did not fall within the ambit of this statute and therefore the arrest was illegal. 622 F.2d at 835. Williams further contended that if the initial arrest was illegal, then all evidence of the heroin must be suppressed as fruits of an illegal arrest. *Id.* *See* Wong Sun v. United States, 371 U.S. 471 (1963).

dence and the Fifth Circuit affirmed.[13] On rehearing en banc[14] the United States Court of Appeals for the Fifth Circuit reversed[15] *holding* both the arrest and the search incident to it were legal, and even if the arrest was illegal, Agent Markonni's reasonable, good faith belief that defendant's violation of the court imposed travel restriction subjected her to a legal arrest was sufficient to avoid suppression of the evidence under the exclusionary rule. *United States v. Williams,* 622 F.2d 830 (5th Cir. 1980).

The exclusionary rule (rule) prohibits the use in a criminal proceeding of any evidence in violation of the defendant's constitutional rights.[16] Since its creation more than sixty-five years ago,[17] the rule has

13. United States v. Williams, 594 F.2d 86, 87-88 (5th Cir. 1979). In suppressing the evidence, the district court rejected a magistrate's recommendations. 622 F.2d at 835. The magistrate had concluded that the arrest was legal and all evidence had been legally obtained. *Id.*

14. 622 F.2d at 833. The Court of Appeals for the Fifth Circuit reheard the case en banc upon its own motion. 594 F.2d 98 (5th Cir. 1979). The rules of court in the Fifth Circuit allow for a rehearing en banc on the motion of any judge of the court. 5TH CIR. R. 16.2.

15. 622 F.2d at 833. The court reached alternative majority holdings, with each alternative commanding a majority composed of different members of the 24 member court. *Id.* For a further discussion of these alternate holdings, *see* note 56 *infra.*

16. United States v. Calandra, 414 U.S. 338, 347-48 (1974). However, "despite the broad deterrent purpose of the exclusionary rule, it has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." Stone v. Powell, 428 U.S. 465, 486 (1976). Thus, the exclusionary rule is not co-extensive with the fourth amendment guarantee that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend IV. In fact, it has been stated that " 'the same authority that empowered the Court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach.' " Stone v. Powell, 428 U.S. at 500 (Burger, C.J., concurring) *quoting* Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CALIF. L. REV. 929, 952-53 (1965) (brackets supplied by the Court) (footnote omitted). It is not surprising, therefore, that the exclusionary rule, although emanating from the fourth amendment, has been used flexibly by the Court. *See, e.g.,* Michigan v. DeFillippo, 443 U.S. 31 (1979) (admitted evidence found in search based on statute later found unconstitutional); United States v. Ceccolini, 435 U.S. 268 (1978) (admitted testimony of witness where sufficiently attenuated from illegal search); United States v. Janis, 428 U.S. 433 (1976) (balance the rule's deterrent effect against societal costs imposed by exclusion); Stone v. Powell, 428 U.S. 465 (1976) (refusing to apply the exclusionary rule to a fourth amendment claim brought by a state prisoner on federal habeas corpus); United States v. Peltier, 422 U.S. 531 (1975) (admitted evidence found in search based on statutory construction later found unconstitutional); Michigan v. Tucker, 417 U.S. 433 (1974) (admitted testimony of witness found through unconstitutional interrogation); United States v. Calandra, 414 U.S. 338 (1974) (refusing to apply the rule in grand jury proceedings); Linkletter v. Walker, 381 U.S. 618 (1965) (refusing to give the rule retroactive application); Walder v. United States, 347 U.S. 62 (1954) (refusing to apply the rule where the evidence is used solely for the purpose of impeaching a witnesses' testimony at trial). *See also* Geller, *Enforcing the Fourth*

generated a great deal of commentary and criticism.[18] Most recently, that criticism has been directed at the rule's "nonselective application" in that the rule ignores "the nature of the underlying violation" [19] and is applied to "both flagrant police misconduct and hapless official error." [20]

One solution suggested by the rule's critics has been the adoption of a "good faith" exception [21] to the rule in circumstances where the officer's violation was committed with the reasonable, good faith belief that his actions were legal.[22] The exception would apply to two frequent kinds of violations: "good faith mistakes," those situations where the officer makes "a judgmental error concerning the existence of facts sufficient to constitute probable cause;" [23] and "technical violations," those situations where "an officer . . . rely[s] upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court precedent which is later overruled." [24]

The Supreme Court, in its recent pronouncements in cases involving the exclusionary rule, has set the stage for adoption of a good faith

Amendment: The Exclusionary Rule and its Alternatives, 1975 WASH. U. L. REV. 621, 623 & 625-40.

17. Weeks v. United States, 232 U.S. 383 (1914). *Weeks* made the rule applicable to the federal courts. *Id.* For a discussion of the rationale behind the rule in its original form, *see* note 27 *infra.* The rule was not made applicable to the states until 1961. Mapp v. Ohio, 367 U.S. 643 (1961). For a discussion of *Mapp, see* 7 VILL. L. REV. 130 (1961). For a concise history of the rule's development, *see* Stone v. Powell, 428 U.S. 465, 482-83 (1976). *See generally* Geller, *supra* note 16, at 625-40.

18. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting); Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 424 (1971) (Burger, C.J., dissenting). One criticism frequently leveled against the rule is that its only direct effect is to exclude reliable and probative evidence from the fact finder. Stone v. Powell, 428 U.S. at 489-91; Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 737 (1972). Furthermore, as yet there is no proof that the rule is an effective deterrent of future police misconduct. *Id.* at 739. *See generally* Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 672-709 (1970).

19. Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule,* 69 J. CRIM. L. & C. 635 (1978). While the rule has not been applied in all situations, those circumstances where the rule has not been applied "do not relate to the nature of the offense." *Id.* at 635 n.4. For a discussion of cases in which the rule has not been applied, *see* note 16 *supra.*

20. Ball, *supra* note 19, at 635, *citing* Brown v. Illinois, 422 U.S. 590, 609-12 (1975) (Powell, J., concurring in part).

21. Stone v. Powell, 428 U.S. 465, 501-02 (1976) (Burger, C.J., concurring); *id.* at 538 (White, J., dissenting).

22. *Id.* at 538 (White, J., dissenting). Justice White emphasized that the officer's good faith belief that his actions were legal must also be objectively reasonable. *Id.* at 538-40 (White, J., dissenting).

23. Ball, *supra* note 19, at 635. *See, e.g.,* Stone v. Powell, 428 U.S. 465, 535-40 (1976) (White, J., dissenting).

24. Ball, *supra* note 19, at 635-36. *See* Stone v. Powell, 438 U.S. 465, 499 (1976) (Burger, C.J., concurring); *id.* at 538-40 (White, J., dissenting); Brown v. Illinois, 422 U.S. 590, 611-12 (1975) (Powell, J., concurring in part).

exception.[25] In *United States v. Calandra*,[26] the Court characterized the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved." [27]

This definition furthered the possibility of a good faith exception in two ways.[28] First, by rejecting the premise that the exclusionary rule is mandated by the Constitution, the Court opened the door to the development of exceptions, including one based on good faith.[29] Second, by specifying deterrence of future police misconduct as the *exclusive* rationale for the rule,[30] the Court implied that the rule should not apply

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25. United States v. Calandra, 414 U.S. 338 (1974). *Calandra* dealt with the application of the rule in the context of grand jury proceedings. *Id.* at 339. The Court held that it would not extend the exclusionary rule to such proceedings. *Id.* at 349-55. For a further discussion of cases where the rule does not apply, *see* note 16 *supra*.

26. 414 U.S. 338 (1974).

27. *Id.* at 348. *But see id.* at 357 (Brennan, J., dissenting) ("The exclusionary rule . . . [is meant to accomplish] the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people . . . that the government [will] not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."). Prior to *Calandra* several competing justifications were advanced as the basis for the rule. *See* Ball, *supra* note 19, at 650 & n.157. They included the maintenance of judicial integrity, the fourth amendment right to be protected from illegal searches and seizures, a combination of the protections of the fourth and fifth amendments, and the aforementioned deterrence of future constitutional violations. *Id.* at 650 n.157. *See, e.g.*, United States v. Calandra, 414 U.S. 338, 348 (1974) (basing the rule on deterrence of future police misconduct); Mapp v. Ohio, 367 U.S. 643, 656 (1961) (basing the rule on fourth amendment rights alone); *id.* at 661-66 (Black, J., concurring) (basing the rule on a combination of fourth and fifth amendment rights); Elkins v. United States, 364 U.S. 206, 222 (1960) (basing the rule on fourth amendment rights and the imperative of judicial integrity). *See generally* Geller, *supra* note 16, at 640-56.

28. *See* notes 29 & 30 *infra*.

29. Ball, *supra* note 19, at 605. If the rule were perceived as a constitutional requirement, then a violation would require its application regardless of whether the officer acted reasonably and in good faith. *Id.* Application of the rule would be *the* method for effectuating the fourth amendment. *Id.* However, once the rule is recognized as a judge made remedy for official misconduct, courts are free to apply it only in those instances where its purposes will be served. United States v. Calandra, 414 U.S. at 348. *But see* Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251, 272-81 (1979) (presenting a theory that there is a personal constitutional right to exclusion); Sunderland, *The Exclusionary Rule: A Requirement of Constitutional Principle*, 69 J. CRIM. L. & C. 141, 148-50 (1978) (presenting a theory supporting the exclusionary rule as a requirement of constitutional principle).

30. United States v. Calandra, 414 U.S. at 348. *Accord*, Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979); Stone v. Powell, 428 U.S. 465, 486 (1976).

in those situations where deterrence of future police misconduct cannot be achieved.[31]

A "technical violation" or "good faith mistake" exception to the exclusionary rule, while having never been adopted by a majority of the Supreme Court, has found support in several recent decisions.[32] In *Michigan v. DeFillippo*[33] the Court faced the question of "whether an arrest made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality."[34] In admitting the evidence seized in the search made incident to that arrest, the Court held that an officer's determination of whether an offense has been committed does not include passing judgment on the constitutionality of the ordinance being relied upon.[35]

While no decision has come as close to adopting the "good faith mistake" exception to the rule as the *DeFillippo* Court did to adopting the "technical violation" exception, four Justices have urged adoption of

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31. Ball, *supra* note 19, at 650. *See* Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979). In words applicable to the "technical violation" basis for the proposed good faith exception, the *DeFillippo* court stated: "The purpose of the exclusionary rule is to deter unlawful police action. No conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search." *Id.* Therefore, if there is no probability of deterrence, there is no rational basis for applying the rule. Stone v. Powell, 428 U.S. 465, 538 (1976) (White, J., dissenting).

32. *See, e.g.*, Michigan v. DeFillippo, 443 U.S. 31 (1979); Peltier v. United States, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974). For a discussion of these cases, *see* notes 33-55 and accompanying text *infra*.

33. 443 U.S. 31 (1979). *DeFillippo* involved a warrantless arrest for violation of a law later declared unconstitutional. *Id.* at 33-34. Acting on probable cause that the ordinance in question had been violated, the officer arrested DeFillippo in good faith reliance on the ordinance. *Id.* Drugs were found on DeFillippo's person in the subsequent search incident to that arrest. *Id.* at 34.

34. *Id.* at 33. The issue as framed by the Court closely resembles the definition of a "technical violation." *See* text accompanying note 24 *supra*.

35. 443 U.S. 31, 37-38 (1979). In an earlier case, the Supreme Court admitted evidence which was seized in a warrantless search made in good faith reliance on a statute subsequently held unconstitutional. United States v. Peltier, 422 U.S. 531, 532-35 (1975). For a further discussion of *Peltier, see* notes 39-40 and accompanying text *infra*.

The Fifth Circuit has reached similar conclusions in dealing with "technical violations" to develop an exception to the exclusionary rule. *See, e.g.*, United States v. Corden, 529 F.2d 443, 445 (5th Cir.), *cert. denied*, 429 U.S. 848 (1976) (an arrest made in good faith reliance on a statute not yet declared unconstitutional is valid); United States v. Hill, 500 F.2d 315, 322 (5th Cir. 1974), *cert. denied*, 420 U.S. 931 (1975) (evidence obtained in good faith reliance on a search warrant later invalidated should be admitted despite a technical violation of the rules governing the issuance of warrants); United States v. Kilgon, 445 F.2d 287, 289 (5th Cir. 1971) (holding that excluding evidence obtained as a result of an arrest under a vagrancy ordinance later found unconstitutional would serve no legitimate interest).

such an exception.[36] In *Michigan v. Tucker*[37] Justice Rehnquist authored a majority opinion which stated that "[t]he deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least negligent, conduct which has deprived the defendant of some right."[38] Thus, "[w]here the official action was pursued in complete good faith . . . , the deterrence rational loses much of its force."[39]

Subsequently, in *Peltier v. United States*,[40] Justice Rehnquist, writing for the majority, concluded that evidence obtained as the result of an illegal search should only be excluded if the officer involved knew or should have known of the unconstitutionality of the search.[41]

Justice Powell voiced his concern with the exclusionary rule's indiscriminate application in *Brown v. Illinois*.[42] In his concurrence in *Brown*, Justice Powell provided only a limited guide to the kinds of

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36. Ball, *supra* note 19, at 635. The members of the Supreme Court who have been identified as supporting the good faith mistake exception are Chief Justice Burger and Justices Rehnquist, Powell and White. *Id.* at 635 n.6. For a discussion of these Justice's views, *see* notes 37-54 and accompanying text *infra*.

37. 417 U.S. 433 (1974). *Tucker* involved admissibility of the testimony of a witness who was located based upon the statements of the accused, who was interrogated without having been giving *Miranda* warnings. *Id.* at 435. For a discussion of these warnings, *see* Miranda v. Arizona, 384 U.S. 436 (1966). The *Tucker* Court held that since the interrogation of the accused took place before the *Miranda* decision, the testimony of the witness who was found from information supplied by the accused was admissible. 417 U.S. at 447-48, 452.

38. 417 U.S. at 447. Although *Tucker* involved an alleged violation of the petitioner's fifth amendment rights, Justice Rehnquist recognized that the situation involved was analogous to past search and seizure cases to rely on the same rationale, *i.e.*, the deterrent purpose of the exclusionary rule cannot be furthered where the officers have acted reasonably and in good faith. *Id.* at 446-47, *citing* United States v. Calandra, 414 U.S. 338, 347 (1974).

39. 417 U.S. at 447. In his dissent, Justice Douglas argued that the fifth amendment exclusionary rule is constitutionally mandated and therefore not subject to an exception based on good faith. *Id.* at 465-66 (Douglas, J., dissenting).

40. 422 U.S. 531 (1975). In *Peltier*, the Court admitted evidence seized in a warrantless search made in good faith reliance on a statute which was subsequently held unconstitutional. *Id.* at 532-35.

41. *Id.* at 542.

42. 422 U.S. 590, 606-16 (1975) (Powell, J., concurring in part). Justice Rehnquist joined in Justice Powell's concurrence. *Id.* at 606 (Powell, J., concurring in part).

Brown involved the admissibility of statements made by the petitioner following an illegal arrest. *Id.* at 591. The issue was whether giving petitioner his *Miranda* warnings made the statements admissible. *Id.* In holding the statements inadmissible, the Court explained that even though the *Miranda* warnings probably saved the statements from exclusion under the fifth amendment, they did not necessarily purge the fourth amendment violation. *Id.* at 601-03. *See* Wong Sun v. United States, 371 U.S. 471 (1963) (recognizing that the fourth amendment exclusionary rule applies to statements obtained following an illegal arrest).

police conduct which may be considered good faith constitutional violations.[43] He distinguished between "flagrant abusive" violations, *i.e.*, those violations which presumably can be deterred by application of the exclusionary rule, at one end of a spectrum and "technical" violations, *i.e.*, those violations which cannot be deterred by application of the rule, at the other.[44]

In *Stone v. Powell*,[45] Chief Justice Burger in a concurring opinion[46] and Justice White in a dissenting opinion[47] joined Justices Rehnquist and Powell in calling for a good faith exception to the exclusionary rule.[48] Noting the lack of any substantial proof that the rule does in fact have a deterrent effect,[49] Chief Justice Burger expressed dissatisfaction with the heavy societal cost which application of the rule exacts.[50]

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43. 422 U.S. at 610-12 (Powell, J., concurring in part). Justice Powell recognized that although "[a]ll Fourth Amendment violations are by constitutional definition 'unreasonable,' . . . [there] are . . . significant practical differences that distinguish among violations." *Id.* at 609 (Powell, J., concurring in part). These differences, he reasoned, could be used to construct a sliding scale to help determine when the exclusionary rule should be applied. *Id.* The key, according to Powell, was in always keeping "the deterrent purpose of the exclusionary rule sharply in focus." *Id.* at 612 (Powell, J., concurring in part).

44. *Id.* at 610 (Powell, J., concurring in part). Powell's attempt at constructing a measuring device for application of the fourth amendment exclusionary rule to statements made following a constitutional violation relies on the deterrent purpose of that rule. *Id.* at 611-12 (Powell, J., concurring in part). "Flagrant abusive" violations constitute one end of the scale because in "cases in which official conduct was flagrantly abusive of Fourth Amendment rights . . . the deterrent value of the exclusionary rule is most likely to be effective." *Id.* at 610-11 (Powell, J., concuring in part). At the other end of the scale are "technical" violations where application of the exclusionary rule would not serve its deterrence rationale. *Id.* at 611 (Powell, J., concurring in part). For a definition of these types of cases, *see* text accompanying note 24 *supra*.

45. 428 U.S. 465 (1976). *Stone* involved a fourth amendment claim raised in the context of a federal habeas corpus proceeding. *Id.* at 468-69. The majority chose not to address the question of a good faith exception to the exclusionary rule. *Id.* at 482 n.17.

46. *Id.* at 496-502 (Burger, C.J., concurring).

47. *Id.* at 536-42 (White, J., dissenting).

48. *See* note 36 *supra*.

49. Stone v. Powell, 428 U.S. 465, 499 (1976) (Burger, C.J., concurring). "Notwithstanding Herculean efforts, no empirical study has been able to demonstrate that the rule does in fact have any deterrent effect." *Id.* For a further discussion of this assertion, *see* note 18 *supra*.

50. 428 U.S. at 500 (Burger, C.J., concurring). Chief Justice Burger recognized that evidence is suppressed not because it is unreliable, but because it has been assumed that this is the only effective method to deter the police from committing constitutional violations. *Id.* at 499-500. *See* H. FRIENDLY, BENCHMARKS, 260-62 (1967). Thus, he asserted that the burden is on those seeking to invoke the rule to demonstrate that the rule "serves its declared deterrent purpose and to show that the results [of its application]

He urged the Court to modify the reach [51] of what he considered a flawed rule.[52]

Justice White's dissenting opinion in *Stone* suggested a substantial limitation on the reach of the exclusionary rule.[53] In addition, he emphasized that where the rationale for the rule's application is not present the rule should no longer apply.[54] This, he argued, was clearly the case where an officer has acted both reasonably and in good faith, since by definition a "reasonable" officer would act in the same manner under similar circumstances, and therefore deterrence was unlikely.[55]

Against this background the *Williams* court formulated two alternative holdings, each of which commanded the support of a different majority of the court.[56] Judge Politz, writing for one majority, held

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outweigh the rule's heavy costs to rational enforcement of the criminal law." 428 U.S. at 499-500 (Burger, C.J., concurring). The Chief Justice saw "it as an abdication of judicial responsibility to exact such exorbitant costs from society purely on the basis of speculative and unsubstantiated assumptions." *Id.* at 500 (Burger, C.J., concurring).

51. 428 U.S. at 496 (Burger, C.J., concurring). Chief Justice Burger, although preferring to see the rule eliminated in favor of "some meaningful alternative . . . to protect innocent persons aggrieved by police misconduct," was willing to settle for modification until such an alternative becomes feasible. *Id.* at 500 (Burger, C.J., concurring). However, the Chief Justice suggested that the adoption of a good faith exception might "inspire a surge of activity toward providing some sort of statutory remedy for persons injured by police mistakes or misconduct." *Id.* at 501 (Burger, C.J., concurring). *See* Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422-24 (1971) (Burger, C.J., dissenting) (urging that a statutory remedy be adopted as an alternative to the exclusionary rule).

52. 428 U.S. at 496 (Burger, C.J., concurring).

53. *Id.* at 537-38 (White, J., dissenting). Justice White argued that the rule has been taken past its original purposes, and, in many cases, has become "a senseless obstacle in arriving at the truth. . . ." *Id.* at 538 (White, J., dissenting). He contended "that the rule should be substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for his belief." *Id.*

54. *Id.* at 538 (White, J., dissenting). For a discussion of the rule's purpose *see* notes 27-31 and accompanying text *supra*.

55. 428 U.S. at 538 (White, J., dissenting). Justice White laid heavy emphasis on the requirement that the officer's actions be reasonable. *Id.* at 538, 539-40. Justice White's argument emphasized that the officer must be "acting as a reasonable officer would and should act in similar circumstances." *Id.* at 539-40. Justice White concluded, therefore, that "[e]xcluding the evidence can in no way [deter] . . . his future conduct unless it is to make him less willing to do his duty." *Id.* at 540.

56. 622 F.2d at 833. Chief Judge Coleman and Circuit Judges Roney, Tjoflat, Garza and Reavley concurred in both majority opinions. *Id.* at 833 & 840.

The alternative majority opinion holding that the initial arrest for violation of the court imposed travel restriction was legal was written by Circuit Judge Politz and joined by Circuit Judges Godbold, Rubin, Kravitch, Frank

that the original arrest was legal and the evidence therefore admissible as obtained from a search incident to a valid arrest.[57] Judges Gee and Vance, co-authoring the alternative majority opinion, held that the evidence should not be suppressed because there is a good faith exception to the exclusionary rule.[58] The majority supporting the latter holding acknowledged that the Supreme Court had never explicitly adopted such an exception,[59] but stated that both logic and the trend of recent Supreme Court decisions indicated that such an exception was necessary.[60]

Initially, the alternative majority noted that the Supreme Court defined the exclusionary rule in *Calandra* as a judge made protective device designed to deter official police misconduct.[61] Therefore, the

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M. Johnson, Jr., Henderson, Hatchett, Anderson, Randall, Tate and Thomas A. Clark, as well as the aforementioned judges. *Id.* at 833. Thus, sixteen out of a possible twenty-four judges held that the arrest was legal. *Id.*

The alternative majority opinion which explicitly adopted a good faith exception to the exclusionary rule was written by Circuit Judges Gee and Vance and joined by Circuit Judges Brown, Ainsworth, Charles Clark, Hill, Fay and Sam D. Johnson. *Id.* at 840. Thus, the number of judges explicitly adopting a good faith exception totalled thirteen out of a possible twenty-four judges. *Id.*

Circuit Judge Hill, joined by Circuit Judge Fay wrote one concurring opinion. Circuit Judge Rubin wrote a second concurring opinion joined by Circuit Judges Godbold, Kravitch, Frank M. Johnson, Jr., Politz, Hatchett, Anderson, Randall, Tate and Thomas A. Clark.

57. *Id.* at 836. The majority who found the evidence admissible as incident to a lawful arrest ruled that Williams' breach of the travel restriction constituted criminal contempt and as such was an "offense against the United States" as that term is used in 21 U.S.C. § 878(3). 622 F.2d at 839. For the text of 21 U.S.C. § 878(3), authorizing warrantless arrests by DEA officers, *see* note 12 *supra*. Therefore, the legality majority concluded, Markonni had statutory authority to arrest Williams, and the evidence obtained from a search incident to that arrest was admissible. 622 F.2d at 839.

58. 622 F.2d at 840-41. For a discussion of this finding *see* notes 59-70 and accompanying text *infra*.

59. 622 F.2d at 841. The majority stated, however, that the Supreme Court and the Fifth Circuit has "all but explicitly adopted the technical violation facet of the good-faith exception," and had rendered opinions giving implicit support for the good faith mistake exception. *Id.* For a discussion of the "technical violation" facet of the good faith exception *see* text accompanying note 24 *supra*. For a discussion of the "good faith mistake" aspect of the exception *see* text accompanying note 23 *supra*.

60. 622 F.2d at 841. The majority stated that recent Supreme Court decisions have established that the exclusionary rule is not coextensive with the fourth amendment. *Id.* The majority also stated that the rule is not required by the Constitution. *Id.* The majority concluded that since the courts are not required to apply the rule, where the purposes of the rule are not effectuated, it should not be applied. *Id.* at 840-42. For a discussion of the rule and its scope, *see* note 16 *supra*.

61. 622 F.2d at 841-42. The majority recognized *Calandra* as the necessary starting point for its analysis because it defined the rule as judge-made and designed for the sole purpose of deterring official misconduct. *Id., citing* United States v. Calandra, 414 U.S. 338, 348 (1974). For a discussion of this reasoning *see* notes 29-31 and accompanying text *supra*.

court continued, the rule should only apply where its purpose can be achieved.[62] Having acknowledged this basic premise, the court went on to note that, because of the high price it exacts from society, the rule is already inapplicable in many situations where it cannot achieve its deterrence purpose.[63] "Technical violations" and "good faith mistakes," the court concluded, clearly fall within this category.[64]

The majority further supported its argument by citing recent Supreme Court and Fifth Circuit cases which denied application of the exclusionary rule on grounds similar to a good faith exception.[65] These cases all noted that application of the rule to situations involving an officer who commits a reasonable, good faith violation, will not be likely to result in deterrence.[66] The court emphasized the narrowness of its holding in stating the importance of the dual requirements of subjective good faith *and* objective reasonableness for the exception to apply.[67] In that way, only those violations where suppression of the evidence would serve no deterrent purpose fit within the exception as fashioned by the Fifth Circuit.[68]

Having adopted the exception, the majority concluded that on these facts Officer Markonni had acted reasonably and in good faith.[69] The court therefore reversed the district court and held that the evidence of the heroin should not have been suppressed.[70]

In his concurrence, Circuit Judge Hill, joined by Circuit Judge Fay, indicated that a good faith exception to the exclusionary rule was the only way to achieve the desirable result of lessening the rule's societal

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62. 622 F.2d at 841-42.

63. Id. at 842. For a discussion of these past limitations *see* cases cited in note 16 *supra*.

64. 622 F.2d at 842 (citations omitted). The good faith majority pointed out that the slight possibility of deterrence gained from excluding evidence discovered as the result of a good faith violation is even less than that which would be gained if evidence were suppressed in those contexts where the rule already does not apply. *Id.* at 842-43. For a discussion of those contexts where the rule already does not apply *see* note 16 *supra*. Therefore, they concluded that societal harm resulting from suppression should be counterbalanced by the application of a good faith exception to the rule. 622 F.2d at 843.

65. 622 F.2d at 843-46. For a discussion of these cases *see* notes 33-55 and accompanying text *supra*.

66. *See* 622 F.2d at 843-46.

67. 622 F.2d at 841 n.4a. This position is similar to that taken by Justice White in *Stone*. *See* note 54 *supra*. The "objective reasonableness" requirement prevents application of the rule in situations where the officer acts in complete good faith but flagrantly violates the victim's constitutional rights. 622 F.2d at 841 n.4a. Thus, the majority emphasized, adoption of the exception will in no way undercut the fourth amendment. 622 F.2d at 841-43, 847.

68. 622 F.2d at 842-43, 847.

69. *Id.* at 846.

70. *Id.* The good faith exception majority concluded that the evidence should not be suppressed regardless of whether the arrest of defendant was legal or not, since they were applying the exception just adopted. *Id.* at 840.

costs without reducing its indirect benefit of deterrence.[71] However, he also stated that the legality of Officer Markonni's search was a constitutional question which need not have been reached once the evidence was found admissible on other grounds.[72]

Circuit Judge Rubin also concurred in the result, but stated that the question of the desirability of a good faith exception would have been more appropriately decided in a case where the arrest was illegal.[73]

It is submitted that the Fifth Circuit's articulation of a good faith exception to the sixty-five year old exclusionary rule is a much needed step forward in the area of criminal law. In certain circumstances evidence obtained by an unconstitutional search may be the most reliable evidence available.[74] Excluding such evidence increases the possibility of setting a guilty defendant free and putting a criminal back on the streets.[75] As a result, the public is frustrated and tends to lose faith in the judicial system. Thus, the rule's *direct* effects benefit only the guilty.

Furthermore, the Supreme Court clearly stated in *Calandra* that deterrence of police misconduct was the sole reason for the adoption of the exclusionary rule.[76] The rule is not a constitutional right, but a judge made remedy.[77] Therefore, it is suggested that when taking these two factors together—the cost to society where the rule is applied and the rule's purpose of deterrence—the conclusion is virtually inescapable that where the probability of deterrence is so minimal as to be negligible, the rule should not be applied. Such is the case where the officer committing a violation has acted reasonably and in the good faith belief that his actions were lawful.

It is further submitted that the exception is narrowly tailored. By requiring that the officer's actions be reasonable, the good faith exception will prevent application of the exclusionary rule where no deterrent purpose can be served, while at the same time leaving the fourth amendment whole and the exclusionary rule's deterrent effect intact.[78]

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71. *Id.* at 847-48 (Hill J., concurring). They thought the good faith exception was a "just result" since it did not cut away at the fourth amendment, and it leaves intact the rule's deterrent effect. *Id.* at 847 (Hill, J., concurring).

72. *Id., citing* Ashwander v. T.V.A., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of").

73. 622 F.2d at 848 (Rubin, J., concurring). Judge Rubin also argued that other reasons for the application still need to be taken into consideration. *Id.* at 849-50 (Rubin, J., concurring). For a discussion of these other reasons *see* note 26 and accompanying text *supra.*

74. *See* H. FRIENDLY, *supra* note 50, at 260-62.

75. *Id. See also* notes 45-55 and accompanying text *supra.*

76. *Id. See* Wright, *supra* note 18, at 737.

77. *See* note 30 and accompanying text *supra.*

78. *See* 622 F.2d at 847 (Hill, J., concurring).

Additionally, it is submitted that because a majority of the Fifth Circuit clearly adopted the good faith exception,[79] the precedential value of that holding will not be substantially affected by the court's alternative holding based on the legality of the arrest.[80] Therefore, considering the need to minimize the harsh results of applying the exclusionary rule to good faith violations,[81] the courts within the Fifth Circuit will most likely apply the good faith exception.

The impact of the *Williams* decision is, of course, unknown, the court having left the correct application of the good faith exception to the exclusionary rule to future cases.[82] However, given that four current Supreme Court justices have indicated approval of a good faith exception,[83] *Williams* may be the spark necessary to achieve Supreme Court review of this important question.[84] Until such time, however, we can only applaud the Fifth Circuit's attempt to contain a rule which has grown far beyond its framers' intent.

David Kuritz

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79. *See* note 56 and accompanying text *supra.*

80. *See* note 57 and accompanying text *supra.*

81. *See* note 50 and accompanying text *supra.*

82. 622 F.2d at 847.

83. *See* note 36 and accompanying text *supra.*

84. Four Justices must vote in favor of granting certiorari in order for the Court to hear the case. Ohio v. Price, 360 U.S. 246-47 (1959). *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 551 (1976).